No. 21766

In the United States Court of Appeals
for the Ninth Circuit

VERNON O. WHITE and INA C. WHITE,
Appellants,

vs.

STEWART L. UDALL, Secretary of the Interior,
Appellee.

BRIEF OF APPELLANTS

On Appeal from the District
Court of the United States for the
District of Idaho, Southern Division

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SUBJECT INDEX

TABLE OF CITATIONS

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JURISDICTIONAL STATEMENT

This is an action for a mandatory injunction and declaratory lief brought pursuant to the provisions of the Administrative Pro- dure Act (5 U.S.C.A. 1001 et seq.) and the Federal Declaratory dgments Act (28 U.S.C.A. 2201 et seq.). The District Court had risdiction under 28 U.S.C.A. 1361. Venue was properly in the istrict Court under 28 U.S.C.A. 1391 (e) (Tr. p. 4).

STATEMENT OF THE CASE

In the years 1923 and 1924 the Appellants located two placer ining claims in the Payette National Forest in Valley County, aho (Tr. pp. 5, 18).

In the year 1959, the Appellants filed with the Idaho Land Office, Bureau of Land Management, at Boise, Idaho, their application for mineral patent (Tr. pp. 5, 18-19). Thereafter they obtained a final certificate showing that all requirements of law had been met for issuance of patent subject, however, to a mineral examination to determine the mineral character of the land (Tr. pp. 5, 18-19).

In August of 1961, the United States Forest Service requested the Bureau of Land Management to institute adverse proceedings and subsequently a complaint was filed raising only two issues to-wit:

1. Whether a valid discovery had been made on the claims; and
2. Whether the land embraced within the claims was non-mineral in character (Tr. pp. 5, 18-19).

Thereafter an administrative hearing was held in March of 1962 (Tr. pp. 6, 18-19), and through subsequent administrative appeals a decision by the Secretary of the Interior was made on December 3, 1965 (Tr. pp. 6, 18-19). All administrative remedies having been exhausted the present action was commenced in the District Court (Tr. p. 5). Following the filing of an answer (Tr. p. 18) the Appellee filed his motion for summary judgment (Tr. p. 21) based upon the administrative record which was stipulated into the record (Tr. p. 20).

Appellants also filed a motion for summary judgment based upon the administrative record (Tr. p. 37). The District Court entered its memorandum decision and judgment granting Appellee's motion for summary judgment (Tr. pp. 92-95).

SPECIFICATIONS OF ERROR

Appellants claim the District Court erred:

1. In granting summary judgment in favor of Defendant-Appellee and against Plaintiffs-Appellants (Tr. pp. 21, 92).

2. In refusing to grant Plaintiffs-Appellants' motion for summary judgment (Tr. pp. 37, 92).

3. In holding that the administrative proceeding was not arbitrary, capricious, an abuse of discretion, and in accordance with law (Tr. pp. 93-94).

4. In holding that the mining claims in question were not supported by a valid discovery (Tr. p. 95).

5. In holding that the land embraced within the mining claims is nonmineral in character (Tr. p. 95).

6. In holding that the administrative body applied the correct principles of law (Tr. p. 95).

7. In holding that the findings of the Secretary are based on substantial evidence and warranted by the facts (Tr. p. 95).

8. In not holding that the long delay in the final administrative decision was in violation of law, in excess of statutory limitations, and short of statutory right in Appellants.

ARGUMENT

I.

THE COLEMAN DECISION IS DETERMINATIVE OF MANY OF

THE ISSUES IN THIS CASE.

On June 21, 1966, this court decided the case of **Alfred Colema et al. vs. United States of America**, Case No. 20,227, a landmark d cision in the field of mining law for it has upset much of the laby- rinth of administrative law established by the Department of the Interior in the handling of mining cases. While the Coleman case dealt with the validity of building stone claims, much of the deci- sion is applicable to the present case where we are dealing primaril with minerals of limited occurrence.

II.

THE PRUDENT MAN TEST IS THE TEST OF A VALID DIS- COVERY.

In this matter the Appellants are claiming discovery of minerals of limited occurrence having intrinsic value. The applicable rule, then, is the prudent man test as established in **Castle vs Womble**, 19 L.D. 455, and as approved by the Supreme Court of the United States (**Chrisman vs Miller**, 197 U.S. 313; **Cameron vs U.S.**, 252 U.S. 450; **Best vs Humboldt Mining Co.**, 371 U.S. 334). It is the application of this rule to the facts of each case which presents the difficult problem, not only to the Department, but to the courts.

In prior years the Land Department was less strict in applying th prudent man test; perhaps too lenient. The pendulum has now swu to the other extreme by administrative determination rather than b legislation, contrary to the original intent of Congress.

The Land Department and the Forest Service pretend to recognize the prudent man test and generally state that it is not necessary to show values which will demonstrate that "a claim can be worked at a profit or that it is more probably than not that a profitable mining operation can be brought about," at least in cases involving minerals having intrinsic value.

United States vs C. F. Smith
66 L.D. 169 (1959)

In fact, however, the requirement is so strict, and contrary to legislative intent, that as a practical matter a miner is in the position that he had better prove commercial value or run the risk of being the victim of administrative fiat.

Economic extraction of buried minerals, at least in this case, is not a proper test, nor is it the test contemplated by the Congress.

At the time our mining laws were enacted, and even today, claims by and large were located by the lone-wolf prospector who, with his mule and grubstake, traversed the unexplored areas of the West. When mineral was found a claim was staked and quite often the discovery pit was found to be in the area of least mineral value. Work was done from year to year and eventually a patent was sought. The Congress and the law did not contemplate that before a patent could issue mineral had to be demonstrated in commercial value or that a mining company would be interested in the claim.

There are many claims even today which provide a small but adequate living for their owners; work being done on a small scale

by one or two men using elementary tools and equipment. These men do not necessarily seek quick riches, but prefer to make a livir content with the knowledge their claims contain ore, which is like "money in the bank."

The mining laws do not require locators of claims to apply for patent within any specified period of time, nor do the mining laws require that all minerals be removed from claims as fast as possible. The only requirement is one of good faith by the doing of annual assessment work.

> "As we have observed, a locator is not required under the minin laws to proceed to a patent."
>
> 1 American Law of Mining, Sect. 1.23 at p. 68

One case is that of Rummell vs Bailey, 320 Pac 2d 653 (Jan 23, 1958), at pp. 656-657, where it is stated:

> "It need not be of any particular assay or richness in quality, no any specified amount in quantity, nor need it be sufficient that it would immediately pay mining expenses. The only essential is that the discovery must be of such significance that a practical, experienced miner of prudence and judgment would deem it advisable to pursue therein or 'lead' thus furnished and to expen further time, effort or money in attempting to develop the property as a mine."

Lindley on Mines, Vol. 2, p. 772, states as follows:

> "The land department, whose function is to determine in all applications for patent what constitutes a discovery, has uniformly adopted a liberal rule of construction. In the judgment of that tribunal, a mineral discovery sufficient to warrant the location of a mining claim may be regarded as proven when mineral is found and the evidence shows that a person of ordinary prudence would be justified in a further expenditure of

his labor and means with a reasonable prospect of success."

Snyder on Mines, Vol. 1, p. 314, Sec. 345, quotes from a decision by Judge Hawley in the case of Book vs Justice Mining Co., 58 Fed. 106, 120, the statement being:

"When a locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the earth or rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery and warrants the prospector in making a location of a mining claim."

Snyder on Mines
Vol. 1, p. 314

One of the leading cases on this subject is that of Narver vs Eastman, 34 L.D. 123, where the Secretary said:

"It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced that it therefore has no commercial value. Take for example the farmer. In the course of husbandry, it frequently happens that different crops raised by the farmer when put in market do not sell for enough to pay the costs of their production and transportation, but can it be truly said crops have no commercial value simply because after the same have been sold and all expenses incident to their production and shipment deducted, there is no clear gain to the farmer, and therefore, as a corollary, that the lands are not valuable for agricultural purposes? And the same may be said as to the entry under this act of land valuable 'chiefly for stone.' Could not the land be valuable chiefly for stone even though, because of its remoteness from market or other causes, the stone could not then be sold for a remunerative price? The statute does not say that the stone must be of a commercial value, or as you construe that term, can be sold at a profit. The statute says, 'lands chiefly valuable for stone.' To adopt the construction you place upon the act requires the interpolation therein of a word so as to make it read

as though Congress had said, 'lands commercially valuable chief for stone,' a thing not justified in view of the plain language use."

Narver vs Eastman
34 L.D. 123, at p. 125

In Tam et al. vs Story, 21 L.D. 440, at p. 442, the acting Secretary said:

"I do not concur in that statement of the law. There must be a discovery before location. (Section 2320, Revised Statutes; **Waterloo Mining Company vs Doe**, 17 L.D. 111); But after discovery and location a subsequent compliance with the provisions of Section 2323 of the Revised Statutes entitles the explorer to patent, and no showing beyond his first discovery is required by the mining laws of the regulations or decisions of the Department. Indeed, after discovery and location, this Department has held that 'his right of possession is as complete as if he had a government patent, provided he continues to put each year the required amount of labor and improvements thereon.' (**Branagan vs Dulaney**, 2 L.D. 744) and the Supreme Court of the United States has held that so long as he complies with the statute as to annual labor and improvements, his title is 'the highest known to the law.' Evidently, then, the value of the mineral deposit is a matter into which the government does not inquire after discovery and location, save in a controversy between mineral and agricultural claimants. If the explorer deemed the deposit of sufficient value to warrant the annual labor and expenditure required, he thereby shows his good faith, and a compliance with the other provisions of Section 2325, Revised Statutes, entitles him, on application to entry and patent." (Emphasis added).

The law does not require that the discovery pit be the place where the most valuable ore be found. Even the rule laid down in Castle vs Womble contemplates further development beyond what is at hand in the immediate discovery pit.

In Burke vs McDonald the Idaho Supreme Court said that a valid discovery has been made when a locator

"finds rock, clay or earth, in place, and so colored, stained, changed and decomposed by the mineral elements as to mark and distinguish it from the enclosing country."

Burke vs McDonald
2 Idaho 679
29 Pac 98 (1892)

In Ambergris Mining Co. vs Day, Judge Ailshie summarized the law on what "indications" the law would treat as substantive evidence in the discovery of the minerals. The Judge also spoke concerning the effect to be given to specific geological conditions and formations which have become recognized and associated with certain minerals found in the area in the discovery of minerals on contiguous ground in these words:

"If a miner has discovered certain mineral indications which he has followed up with the result that a rich and valuable ore body has been developed therefrom, it seems clear that another miner finding similar indications and convictions on contiguous ground or in the immediate vicinity would be in a measure justified in following up these evidences with a reasonable expectation of finding mineral deposits. And this is true even though the indication, rocks and deposits found are such as the expert, scientist, geologist or mineralogist in their finest theories tell him are not evidence of mineral deposits or even that they are evidence of the entire absence of minerals."

"As a matter of fact and greatly to their credit, those scholars who have added so largely to the store of knowledge have been observant and progressive enough to, from time to time, revise and modify their views and theories to keep apace with the actual demonstrations of the man who risks his judgment and delves into the earth at uninviting and unseemly places. The miner, as

well as the man engaged in any other occupation or business is entitled to act on experience and observation, and while he may not, and indeed will not, always attain the same results, the exception to rule does not preclude him from availing of his own observations and those of his fellows as well as demonstrated existing conditions." (Emphasis added).

Ambergris Mining Co. vs Day
12 Idaho 108
85 Pac 109 (1906)

Geological inference alone cannot substitute for the discovery of a valuable mineral deposit. However, such evidence is relevant.

Rummell vs Bailey
7 Utah 2d 137
320 Pac 2d 653

Opinion evidence is also admissible and is to be weighed according to the qualifications of the witnesses.

United States vs Doane
A-28094 (1959)

Kramer vs Sanguinette
33 Cal App 2d 303
91 Pac 2d 604

While annual assessment work is no substitute for discovery, evidence of such done on mining claims is relevant evidence that the claimants themselves were convinced of a future profitable development of the property.

United States vs Al Sarena Mines, Inc.
61 I.D. 280 (1954)

In this case the Appellants have physically lived and worked on

the claims for years, and for about twenty years have devoted their time, effort and money in the development of the claims.

The Secretary in his decision (Tr. p. 14) bases his decision in part on the fact Appellants have not commenced a mining operation and extracted all of the ore. The law does not require this and it was error for him to impose this requirement as a test of discovery.

The court disposed of this argument in the following language:

"Inasmuch as this case should be remanded to the Department for reconsideration under correct legal standards, there are other matters which deserve brief comment. In his final decision, the Deputy Solicitor remarked that the Appellant did not make the required showing of marketability as to all claims. He said: 'Whether expenditures for improvements on other claims may or may not be credited to these (disallowed) claims is immaterial because it is abundantly clear that there was no marketing of any products from these claims.' The Castle vs Womble prudent man test does not require such a showing, although such evidence is, of course, relevant proof under the issue as to each separate mining claim. The Castle vs Womble test implies a forecast of the reasonably anticipable future."

Coleman vs United States
at p. 18

Therefore, the failure to market products from the claims is holly immaterial to the determination of the validity of discovery.

III.

THE MINING LAWS DO NOT REQUIRE A SHOWING OF PROVED ABILITY TO MINE THE DEPOSIT AT A PROFIT.

While the Secretary recognizes this principle of law in his decisi
(Tr. p. 13) he goes on to add:

> "Nevertheless, the value which sustains a discovery must be suc
> that with actual mining operations under proper management a
> profitable venture may reasonably be expected to result.
> (Emphasis added).

Isn't this actually imposing a test of proved ability to mine the deposit as a profit? We submit this is not the law. This court also disagrees with the Secretary's view of the law.

> "The Interior Department decisions and regulations and Court rulings over the years have been interpretations of the General Mining Law of 1872 (17 Stat. 91), which, with respect to the validity of mining locations and applications for patents of mining claims, has remained virtually unchanged since enactment. The problem here presented concerns the interpretation of 'valuable mineral deposit' (30 U.S.C. 22) and 'valuable deposits' (30 U.S.C. 29) as used by the Congress. See: Adams vs. United States (9 CCA 1963), 318 F. 2d 861, 870. Since Castle vs Womble, supra, the basis, judicially approved, standard of discovery of a valuable mineral requires proof that a person of ordinary prudence would be justified in further expenditure of his labor and means, with reasonable prospect of success, in developing a paying mine. 'But value, in the sense of proved ability to mine the deposit at a profit need not be shown.' Adams vs United States, supra. This is clearly the standard applied to metallic minerals and minerals of limited occurrence.
>
> Coleman vs United States
> at p. 12

IV.

LOCATORS' (APPELLANTS') LABOR SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER A MINING OPERATION HAS A REASONABLE PROSPECT OF SUCCESS.

Throughout every phase of the lengthy administrative phase of the present case Appellants have argued the law does not require them to take into account the financial cost of their own labors. To require them to do so imposes a test of marketability to their operations.

The Secretary in his decision (Tr. p. 13) concluded the law to be:

"Labor costs must clearly be considered in determining whether a mining operation has a reasonable prospect of success and there is no reason to treat the value of the labor of the locator any differently from that of one he might hire; either one must be taken into consideration in determining the likelihood of a profitable venture being established."

Again this court takes a different view of the law.

"We have found no case authority on the subject of whether the calculated value of a locator's labor in developing the property should be charged as an expense in determining profitability. This may be because the question has not arisen under the Castle vs Womble test of reasonable expectation of profit, while the Departmental requirement of proof of present profit for location of non-metallic minerals of widespread occurrence is of fairly recent origin. In any event, the history of prospecting and mining in the Western United States records the essence of individualism in economic activity and the Mining Law of 1872 was enacted as a Congressional codification of the procedures and practices of miners. Academic economics has little meaning for a miner and his 'profit' is made if his receipts exceed his out-of-pocket expenditures, although he may be grossly underpaid for his labor."

Coleman vs United States
at pp. 18-19

V.

THE FACT THAT THE CLAIMS ARE IN A NATIONAL

FOREST DOES NOT CHANGE THE PRUDENT MAN TEST.

Section 482, Title 16, U.S.C.A., a part of the original Act autho-zing the creation of national forests, contains the following:

> "And any mineral lands in any National forest which have been r which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regu-tions applying thereto, shall continue to be subject to such loca and entry, notwithstanding any provisions contained in Section 473-482 and 551 of this title."

The prudent man test is the same whether the claim is on or off the forest service land.

In a dispute over timber between a mineral claimant and the forest service a Federal Court said:

> "In the well considered opinions in **Telier vs United States**, 131 Fed 273, and **United States vs Rizzenelli**, 182 Fed 675, the conclusion is reached that the rights of a locator of a mining claim within the boundaries of a forest service are substantially those of one who locates such claim upon the public domain."

United States vs Deasy
24 Fed 2d 108

VI.

THE GOOD FAITH OF APPELLANTS IS NOT AN ISSUE IN THIS CASE.

While there was evidence introduced at the hearing of this conte that valuable improvements exist on Appellants' mining claims by way of timber and the buildings comprising the Krassel Ranger Station, no charge has ever been made against Appellants that they

ıave located their claims other than in good faith for mining pur-
)oses only.

"If the good faith of the applicant in locating the ground for the asserted purpose of exploiting the minerals therein is an issue, the applicant for patent should be put on notice of the issue in the contest complaint."

Coleman vs United States
at p. 20

VII.

GEOLOGICAL INFERENCE MAY BE CONSIDERED IN THIS ASE.

We believe the rule regarding geological inference was well ated by the Hearing Examiner in two recent decisions.

"Admittedly, the contestee's experts are basing their opinions partly upon geologic inference. While it is true that the courts and the Department of Interior have never accepted geological inference standing alone as a substitute for an actual exposure of mineral sufficient to constitute a discovery, geological inference has been considered as one of the factors which must be weighed by a prudent man in determining whether or not the vein or lode containing valuable mineral warrants further development. Jefferson-Montana Copper Mines Company, 41 L.D. 320 (1912). Where the mineral is on the surface, in readily ascertainable amounts, geologic inference can be ruled out. But, where the mineral occurs in vein form below the surface and can only be exposed after extensive development work, geologic inference, to some degree, must be part and parcel of every expert's opinion as to whether economic ore can be found. To rule otherwise would be to nullify the 'prudent man' rule and to allow locations only after the development of commercial ore."

United States vs Lundy
Arizona 10544 (1964)
GFS-BLM-1964-26 (Mining)

"Thus, evidence as to the geology of the region, the proximity the claims to working mines, the economics of mining, and any other fact or circumstance which might possibly affect the succ of a mining venture, would necessarily be considered by a prud man in determining whether or not he would expend further ti and money in following the veins or lodes exposed, and is relev evidence.

"It has been established that on each of the claims, except the Automobile, there are veins or lodes of rock in place containin valuable minerals. Although most of the assays revealed nomin or very low values which could not in any sense be considered worthwhile to mine, nevertheless the mineralization is there."

* * *

"I further conclude that on each of the remaining claims there an exposure of valuable mineralization sufficient to satisfy the requirements of the mining law as to discovery. This conclusion admittedly rests squarely on the acceptance of Mr. Wright's recommendations. Although these can be termed as theory, and therefore there is no guarantee that a paying mine will result, the law does not require a guarantee of success, only a reasonable prospect of such."

United States vs Henault Mining Co.
Montana 035391 (1964)
GFS-BLM-1964-28 (Mining)

VIII.

ONCE A VALID DISCOVERY IS MADE AT ANY POINT WITHIN THE CONFINES OF THE CLAIMS PATENT SHOULD ISSUE.

The government throughout this proceeding has argued that under the mining laws a mineral claimant is not entitled to patent until after he has made a discovery and the discovery point must be in such a condition that a representative of the Government may confirm the existence of a valid discovery.

The underlined requirement is one imposed administratively and not by law. A valid discovery or discoveries at any point withint the confines of the claims is all the law requires for patent. The fact that the mineral examiner may not have been shown or have examined the areas containing the highest values does not preclude an applicant from showing values elsewhere on the claim. To impose such a requirement would be contrary to law, as noted in Coleman, at p. 13 & 14 citing 30 U.S.C.A. Sect. 29.

American Law of Mining states:

"The questions of whether a discovery exists, or when a discovery was made, are questions of fact, and obviously require the introduction of evidence and a decision by the trier of fact. The court, jury or hearing examiner called upon to decide a case involving the question of discovery will ordinarily have a wide latitute for decision for two rather obvious reasons. The first is that in any case of this type, a great deal of evidence will probably be introduced, both of the factual and opinion varieties, and secondly because of the wide latitude for decision found in the intangible character of the applicable rules of law. What a prudent man would or would not do under a given set of circumstances and conditions may vary widely according to the differing viewpoints of different triers of fact, the type of case, and the approach adopted (e.g., the stringent view of the Land Department as opposed to the more lenient viewpoint in cases involving rival locators)."

1 American Law of Mining, Sect. 4.51

There is, therefore, no formula by which the trier of the facts c
arrive at what constitutes a valid discovery merely by looking at t
assay reports, assuming the correct law is being applied.

IX.

THE ADMINISTRATIVE PROCEDURE ACT REQUIRES EVERY AGENCY TO PROCEED WITH REASONABLE DIS PATCH TO CONCLUDE ANY MATTER PRESENTED TO IT.

The original application for patent filed by Appellants was on November 23, 1959, and the final decision of the Secretary of the Interior was not entered until December 3, 1965. The Appellants contend that this delay has been prejudicial to their rights in that they have not been able to proceed with further development and possible sale of the claims.

In a case decided by the Fourth Circuit in 1961 the court observed:

> "In paragraph 6(a) of the Administrative Procedure Act, it is specifically provided: '*** every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives.***'
>
> "This is no precatory declaration. It is an enforceable command, made expressly so by Section 10(e) of the Administrative Procedure Act, which provides that the court 'shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law**; (3) in excess of statutory jurisdiction, authority,

or limitations, or short of statutory right; ***' "

Deering Milliken, Inc. vs Johnston
295 F 2d 856
4 Cir. 1961

CONCLUSION

From the evidence and entire record in this case it is apparent that had the Secretary applied the correct law the Appellants would have long ago received their patent. There are more than ample showings of minerals to meet the prudent man test.

Mr. and Mrs. White have devoted over 40 years of time and effort in hand working these claims, most years in their spare time, and with the knowledge and confidence their claims contain valuable deposits of gold and silver and other values of prospective marketability. Through the years they have been content to develop these claims on a limited and small scale, having no desire to extract the values more rapidly than they have or required by law. They have had a long and hard struggle as the record in this case will show, in endeavoring to obtain a patent to these two claims. One cannot help but feel that had it not been for some mistake by the Forest Service when it constructed the Krassel Ranger Station upon these claims without first securing the Whites' permission and consent, this contest would not have arisen.

Under-Secretary of the Interior, Clarence A. Davis, in a statement made January 26, 1956, before the Subcommittee on Legislative Oversight, of the Senate Interior and Insular Affairs Committee, and the Subcommittee on Power and Natural Resources of the

House Committee on Government Operations, observed:

"Much of the economy of the Western states has been based upon mining. The results of mining operations are always speculative since it is never possible to state with certainty the value of the minerals under the ground.

The patenting of mining claims over the years, therefore, has gone forward by the thousands, based only upon a discovery and the hope that a profitable venture can be developed. This must be remembered in any consideration of mining problems.

Nevertheless, a few years ago, the Department of the Interior attempted to inject into the mining laws a standard of discovery which required profitable operation and a showing that the mineral deposits had the greater comparative value than other uses. This is not the standard set up by law.

The Department has the authority to open and close areas to mining locations. When lands are opened, they are subject to the mining law as it exists. When they are closed no one can even stake a claim on them.

To allow mining claims to be located and then to judge them on standards other than those set up by the Congress and the Supreme Court is administrative legislation.

If we are to adopt the philosophy that any department of Government is to be vested with such vast powers, then it should be done by an act of the Congress and not by administrative decision."

Howard A. Twitty, Esquire, an outstanding mining attorney of Phoenix, Arizona, said in the July 20, 1962, issue of PAY DIRT:

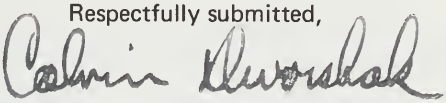
"So long as the Interior Department seeks to make further inroads in the law of discovery of the character illustrated in Altmas and Russell and the New Jersey Zinc contest, the end is not yet in sight. It is to be hoped, when the next discovery

case reaches the courts, the law of **Castle v. Womble** will be restated with definiteness, and we will have a recent judicial precedent setting forth the law of discovery and the reason therefor, as stated in **Castle v. Womble**, without the changes written into the law of discovery by later Interior Department decisions."

We believe Mr. Twitty's wishes and hopes have been met by this court in the **Coleman** case.

We respectfully urge the granting of Appellants' motion for summary judgment.

Respectfully submitted,



Calvin Dworshak
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CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

Calvin Dworshak
Counsel for Appellants

SERVICE of the foregoing Appellants' brief is hereby accepted by receipt of three copies thereof this 5TH day of December, 1967.

SYLVAN A. JEPPESEN
United States Attorney

By JAY F. BATES
Assistant United States
Attorney

I hereby certify that on the 5TH day of December, 1967, I served three copies of the within brief upon Edwin L. Weisl, Jr., Esquire, Assistant Attorney General, U. S. Department of Justice, Washington, D. C. 20530, by depositing the copies thereof in the United States mail, at the above address.

Calvin Dworshak
Calvin Dworshak